United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1337

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

CARMINE J. PERSICO, JR., APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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I N D E X

C I T A T I O N S

Cases:

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No. 74-1337

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v.

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ISSUE PRESENTED

Whether the district court properly concluded that in the particular circumstances of this case, involving primarily an alleged recantation of trial testimony by a government witness, no evidentiary hearing was required on appellant's motion to vacate sentence under 28 U.S.C. 2255.

STATEMENT

This case, arising out of the hijacking of a truck from the Akers Motor Terminal in Brooklyn on July 28, 1959 and based on an indictment returned in the Eastern District of New York in April 1960, has previously been before this Court on four occasions. This is appellant's third application for post-conviction relief.

The indictment charged appellant and five co-defendants, Spero, Albanese, McIntosh, LaFante, and Magnasco[1] with obstructing commerce by robbery and with conspiracy in violation of 18 U.S.C. 1951 and 371. The first trial, in May 1961, ended in a jury disagreement. Appellant's conviction on both counts at the second trial in June 1961, was reversed on appeal, United States v. Persico, 305 F. 2d 534 (1962). The third trial in 1963 resulted in a mistrial as to appellant, Albanese and Spero and jury disagreement as to the other defendants.[2] Appellant's conviction following the fourth trial in 1964, was reversed on appeal, United States v. Persico, 349 F. 2d 6 (1965). Appellant and the other defendants were tried a fifth time in April and May of 1968. Thereafter, following a mandamus petition, this Court ordered the trial court (Dooling, J.) to enter judgments on the jury verdicts of guilty, United States v. Dooling, 406 F. 2d 192, certiorari denied, 395 U.S. 911 (1969).[3] Appellant then appealed from those convictions, which were affirmed, United States v. Persico, 425 F. 2d 1375 (1970), certiorari denied, 400 U.S. 869 (1970).

In October 1970, appellant commenced proceedings for a new trial on the ground of newly discovered evidence, After a hearing, Judge Dooling issued

1/ Magnasco was murdered following his conviction at the second trial on these charges. LaFante was acquitted following the fifth trial on these charges.

2/ This mistrial was ordered because Persico was shot and wounded on a Brooklyn street.

3/ Appellant was sentenced to fourteen and nine years' imprisonment, respectively, on the two counts.

his memorandum opinion and order, denying the motion (A. 11-23).[4] On January 13, 1972, this Court affirmed the order of the district court, United States v. Persico, 454 F. 2d 721.

On January 26, 1972, appellant again moved for a new trial pursuant to Rule 33, F.R.Crim.P. On March 15, 1972, the district court (Travia, J.)[5] issued its opinion and order, denying the motion for a new trial, 339 F. Supp. 1077 (A. 794-832). On October 20, 1972, this Court affirmed the order of the district court, United States v. Persico, 467 F. 2d 485.

On October 31, 1973, appellant sought to vacate the judgment against him pursuant to 28 U.S.C. 2255. On January 3, 1974, Judge Dooling issued his memorandum opinion and order denying the motion (S.A. 53-88). This appeal followed.

I

TRIAL (APRIL and MAY, 1968)

The factual background of this case is set forth in the previous opinions of this Court. See 305 F. 2d 534; 349 F. 2d 6; 406 F. 2d 192; and 425 F. 2d 1375. For a more thorough discussion thereof, see the government's response to the previous motion for a new trial before Judge Travia (A. 700-703). Briefly, the facts showed that on July 28, 1959, a truck was hijacked shortly after it was loaded with piece goods at the terminal of the Akers Motor Lines in Brooklyn. At the fifth trial, as in the four previous trials, the govern-

4/ "A." refers to both the appendix previously filed with this Court in United States v. Persico (No. 71-1648) 454 F. 2d 721 (1972), and that filed in United States v. Persico (No. 72-1472), 467 F. 2d 485 (1972). "App." refers to the appendix filed by appellant in this case, and "S.A." refers to the supplemental appendix filed by appellee in this case. "Tr." refers to the transcript of proceedings at the fifth trial.

5/ This matter was assigned to Judge Travia after Judge Dooling, who presided at the fifth trial, recused himself.

ment's principal witness was Gaspar Vaccaro who testified that he conspired with appellant and others to hijack the truck. Vaccaro, acting pursuant to appellant's instructions (T. 1042-1048), "spotted" a truck at the Akers Terminal (T. 1075-1090). Thereafter, he, Albanese, and Spero stopped the truck some distance from the terminal and held the driver, Edward Kennedy, until the others took the contents of the truck (T. 1109-1114, 1118, 1120-1125, 1220-1223, 1230-1232, 1237-1238). Vaccaro also testified that appellant planned and directed the operation and that the other defendants participated in the actual hijacking (T. 1042-1048, 1053, 1075-1093, 1096-1106, 1280-1285, 1295-1301). The driver testified concerning the holdup and kidnapping but claimed he was unable to identify the hijackers because of the use of taped glasses. At the fifth trial, the government also called Joseph Valachi as a witness for the first time to testify as to certain admissions made by several of the defendants. Valachi testified concerning a conversation in which appellant admitted paying money to one Joe Profaci as "taxes" in the Akers hijacking and in which appellant admonished Albanese and McIntosh to listen to Valachi in the future and to seek his advice (T. 2792-2793). 6/

6/ Valachi also testified that Albanese had secured the false testimony of his wife at the 1961 trial in an attempt to discredit Vaccaro. Mrs. Albanese falsely testified as to an attempted assault on her by Vaccaro (T. 2778-2781, 2786-2787).

II

THE FIRST NEW TRIAL MOTION AND HEARING BEFORE JUDGE DOOLING (OCTOBER 1970 TO JUNE 1971)

In the first motion for a new trial, brought by appellant, McIntosh, Spero and Albanese, it was alleged that Vaccaro had lied when he testified that on July 28, 1959 he "spotted" the truck which was later hijacked. 7/

Harold O'Shea, a twenty-one year employee of Akers, testified at the hearing that he had agreed to inform Vaccaro when he spotted a good load for a possible hijacking, and that sometime during the summer of 1959, he did spot the truck which was evenutally hijacked and did advise Vaccaro of its location (A. 55-60). O'Shea claimed never to have mentioned his involvement to anyone; defendant McIntosh brought O'Shea to the attention of defense counsel, but the manner in which O'Shea's involvement became known to him was never disclosed (A. 62-63, 65, 133-140, 165-167, 285, 288-290, 496-497).

Vaccaro testified that O'Shea had in fact spotted the load (A. 474-475, 478). He was referred to his 1968 trial testimony in which he had said none of the loaders at Akers came to the bar that night. He was asked if he was mistaken as to that testimony and replied that he was, as O'Shea had met him that morning and had tipped him about the truck to be hijacked (A. 478-479).

Vaccaro further testified that he had approached O'Shea after Persico had asked him about loaders from Akers Terminal and had suggested that he try to get an Akers employee to perform as a tipster for the hijacking (A.

7/ It was also alleged that Vaccaro in 1967, after his release from prison, had been a bookmaker while employed at a bar in New Jersey. The government, though previously unaware of this activity, conceded Vaccaro had accepted some bets while working as a bartender but argued that this newly discovered evidence was merely impeaching and therefore did not warrant a new trial. The district court concluded that testimony as to Vaccaro's bet-taking probably could not have been introduced at trial for impeachment.

484) and that he had informed appellant that he had received a tip as to the load (A. 487). Vaccaro also said that he went down to the Akers Terminal several times to spot a load and that on each occasion he was acting under appellant Persico's instructions, reporting back to him on each occasion (A. 484-485). Vaccaro could not recall whether or not he had gone to the terminal to spot a load on the night of July 27-28, stating that he had been to the terminal on so many different occasions involving so many different hijackings that he could no longer remember the details of each (A. 485-486).

In denying the motion for a new trial, Judge Dooling concluded (1) that had Vaccaro testified at trial that there had been a tipster involved in the hijacking scheme and had this testimony been corroborated by O'Shea, this testimony would have been "less likely to assure acquittal than to increase the likelihood of conviction"; (2) that appellants failed to exercise due diligence in discovering O'Shea; and (3) that the testimony of O'Shea and Vaccaro's adoption of that testimony were not credible (A. 11-23).

III

THE NEW TRIAL MOTION BEFORE JUDGE TRAVIA
(JANUARY TO MARCH 1972)

On January 19, 1972, Gaspar Vaccaro appeared at the chambers of Judge Dooling, who presided at appellants' fifth trial and the hearing conducted on appellant's previous motion for a new trial. At that time Vaccaro informed Judge Dooling that his trial testimony had been mistaken and that in fact neither appellant nor co-defendant McIntosh had been involved in the hijacking for which they were convicted (A. 629-632). Judge Dooling advised Vaccaro to consult an attorney (A. 634). According to Vaccaro, he then contacted Mr. Lopez, an attorney, on January 21, 1972 (A. 3-4, 8-9); his statement was transcribed on January 23, 1972 (A. 20).

Vaccaro stated in his deposition:

> In this particular hijacking that Carmine Persico was convicted of, I find in my mind that he was involved in other hijackings, and I have mistaken him to be part of this particular hijacking, which he had nothing to do with (A. 631; see also, 634-635, 637).

Vaccaro stated further that his recollection as to the specific circumstances of the hijacking, particularly the fact that appellant was not involved, was refreshed at the previous hearing on the motion for a new trial when he was confronted with the testimony of Harold O'Shea (A. 631-633). He also stated: "I have known from the very beginning that there was a mix-up to which hijacking that Carmine Persico didn't have nothing to do with. I didn't know whether it was this particular one that he was convicted on, or the others" (A. 634-635). Vaccaro further deposed that he had been mistaken when he informed Judge Dooling on January 19, that McIntosh was not involved in the hijacking (A. 631-632). Vaccaro indicated he was aware that his statements could subject him to charges of perjury (A. 626, 638-639); he indicated as well his awareness of the possible penalty which could be imposed for each offense (A. 626).[8/] According to Vaccaro, his statements were given voluntarily and were not the product of coercion or promise of reward (A. 626-627). Vaccaro expressed his motivation for having recanted certain of his previous testimony as follows:

> I just felt inwardly that I don't care about Carmine Persico or anybody else that is involved in this thing. The only thing that I care of is that he is going away on something that he didn't do (A. 637).

8/ Vaccaro's change of testimony subjected him to the possibility of indictment under both 18 U.S.C. 1001 and 18 U.S.C. 1623. He has made statements to the Federal Bureau of Investigation and has testified about this case and Persico's involvement before the grand jury and at five trials. Each offense carries a maximum five years' term of imprisonment.

> * * * I feel with all the possible punishments that I am facing, I still feel inwardly that the mistakes were made from the beginning, there was a bunch of confusion and the confusion later on was ironed out in these trials, and the mistakes were made, not intentionally, unintentionally, and then, as the years passed by, and none of them ever went to jail and now that he was convicted on the wrong one through my mistake, I feel it is my duty to correct it, and that's it (A. 640).

On the basis of Vaccaro's recantation of previous testimony implicating appellant with respect to the July 28, 1959 hijacking of a truck from the Akers Motor terminal and an allegation that the prosecution suppressed evidence of value to the accused, appellant, on January 26, 1971 sought a new trial on the grounds of newly discovered evidence.

Over appellant's objection, the motion was determined on the basis of affidavits (A. 644-651, 656-658, 660-665, 674-675, 682, 688, 691-693).[9/]

On March 15, 1972, the Court issued its Decision and Order denying the motion for a new trial (A. 794-832). The district court held, initially, that an evidentiary hearing was not required because the motion could be adequately determined on the basis of affidavits and other materials presented (A. 807-817).[10/] The district court went on to conclude that Vaccaro's

9/ On the day of the scheduled hearing, when appellant sought an adjournment and the government opposed on the ground that the motion could be adequately resolved on the basis of affidavits and memoranda of law, Vaccaro was called as a witness and adopted the previously submitted deposition as his sworn testimony (A. 679-681).

10/ The district court had before it Vaccaro's grand jury testimony and his testimony at the trials as well as the affidavits of the prosecutors and FBI agents who interviewed Vaccaro during this lengthy period.

As the court noted (A. 815), consistent with Judge Dooling's previous observation (A. 13), Vaccaro's recital of appellant's participation in the hijacking remained substantially unchanged over a period of many years, throughout five trials, where his testimony was subjected to rigorous cross-examination, before the grand jury and in statements to the Federal Bureau of Investigation. The fact that Vaccaro's specific and detailed account of Persico's involvement in the hijacking remained consistent throughout this period even though exposed to "enormous pressures" (A. 815) belied the credibility of a recantation stemming

(footnote cont'd.)

recantation was utterly lacking in credibility (A. 823, 831). While this finding was amply supported by the record on several grounds (see Gov't. Br. on Appeal at pp. 14-19, No. 72-1472), we point out here two bases for that conclusion. After noting that "[t]he circumstances surrounding Vaccaro's recantation clearly involve[d] the likelihood that it [was] of dubious origin to say the least" (A. 817), the court observed that "Vaccaro's fear of harm from those against whom he testified is a matter of record" (A. 818-819; Tr. 1635, 1644-45, 1649, 1655-1656).[11/] Secondly, Vaccaro also stated that when he recalled that

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from an alleged confusion regarding the events. The court noted the stark contrast between Vaccaro's precise and detailed recollection of events over the past decade and his rather vague recantation (A. 816). This alleged confusion became particularly suspect when contrasted with the recollection of those in close contact with Vaccaro during this period who repeatedly heard Vaccaro's account of the hijacking, including appellant's involvement therein. The unanimous recollection of those individuals was that Vaccaro's relation of events surrounding the hijacking, including appellant's participation, was clear, precise and unhesitating (A. 869-880, 912-913).

Moreover, as the court noted, Vaccaro, in his statement to Judge Dooling, claimed to have been mistaken as to the participation of both appellant and co-defendant McIntosh. He subsequently stated, however, that he was mistaken in that statement and that only appellant was not involved in the hijacking (A. 630-632, 817). The court concluded this change of testimony, occurring within four days of having spoken with Judge Dooling, further demeaned the credibility of the recantation (A. 817).

11/ This fear was also communicated to various federal officials throughout the entire case (A. 818-819; Gov't. Br. on Appeal at p. 17, No. 72-1472).

Harold O'Shea had acted as a tipster in the hijacking, his memory was triggered and he became convinced that appellant was not involved in the 1959 Akers hijacking (A. 632-633). However, Judge Dooling had concluded in the previous motion for a new trial that O'Shea's testimony was not credible and that Vaccaro's testimony, to the extent that it corroborated O'Shea, was also not to be believed (A. 22-23). Thus, the district court concluded that the allegation that Vaccaro's recollection was refreshed by O'Shea's dubious testimony was "beyond [the] Court's capacity for belief" (A. 821).

IV

THE MOTION (28 U.S.C. 2255) BEFORE JUDGE DOOLING (THE SUBJECT OF THE PRESENT APPEAL)

A. The Alleged Recantation of Joseph Cancelli.

Vaccaro testified at trial that at 5:00 a.m. on the morning of the hijacking, after having "spotted" a fully loaded truck at the Aker's Terminal, he returned to the car and informed appellant and the others of its availability (Tr. 1075-1090). Appellant then asked co-defendant Spero if he still had the car which had been stolen. Spero replied that he did and was then instructed by appellant to get the car and park it nearby (Tr. 1091-1093). This testimony was corroborated by other evidence establishing that the car had been stolen and that the license plates of the stolen automobile had been switched with those used by co-defendant Spero and registered to Spero's brother (Tr. 3200-3214, 3276-3279, 3244-3249).

Joseph Cancelli[12/] testified at trial that in November, 1959 he was arrested in possession of an automobile bearing stolen license plates (App. 7, 14-18; Tr. 3200, 3207-3211). Although presumably not aware of the fact, these

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12/ Cancelli testified at the fourth and fifth trials only.

were the plates taken from the stolen car used in the hijacking and switched with those on an automobile used by co-defendant Spero and registered to Spero's brother (Tr. 3276-3279, 3244-3249). Cancelli testified that he was at the time living in Ellenville, New York with his uncle and family at a "summer place" owned by his uncle. He met Spero, who also resided there for approximately two months, in October 1959. Cancelli and his uncle indicated to Spero that they were without transportation and Spero offered to give them his car, which was in Brooklyn (A. 8-11; Tr. 3201-3204). In November, he and Spero's brother went to the brother's residence in Brooklyn and picked up the car (App. 12-13; Tr. 3205-3206). On the return trip to Ellenville, Cancelli was arrested when a state trooper, who had stopped to assist him when car trouble developed, discovered that the car registration and license plates did not match, which incident lead to the discovery that the plates were in fact stolen (App. 13-15; Tr. 3206-3208).

Subsequently, in December 1959, Cancelli, accompanied by a friend, went to the Chateau Russo Bar in Brooklyn where he spoke with Spero.[13/] Cancelli said to Spero: "Thanks for giving me a car that got me locked up." (App. 19; Tr. 3212). Spero apologized (App. 19; Tr. 3212). Cancelli testified further that during the course of the conversation, they were joined by appellant Persico who "gave [Spero] hell for giving him that car with the license plates on it" (App. 20; Tr. 3213). Specifically, appellant remarked: "'You were stupid in giving him that car with the license plates'" (App. 21; Tr. 3214).

13/ The Chateau Russo was used by appellant and the others as a base of operations for the hijacking of the Akers Terminal, located in the same vicinity (Tr. 1030, 1032-1033, 1036-1048). Spero had told Cancelli that he could always be reached at the Chateau Russo (App. 18-19; Tr. 3211-3212).

Appellant's present collateral attack on his conviction is, like the others, predicated primarily upon an alleged recantation of testimony by a government witness and allegations of prosecutorial misconduct in connection with the testimony of the witness.

The basis for Cancelli's alleged recantation is an interview of Cancelli, taped and transcribed and submitted to the district court, conducted on August 10, 1973, by two individuals, Salvatore Reale and Frank Santelli, identified in the moving papers as private investigators employed by appellant's counsel to tape the conversation (see p. 5 of the Appellant's Motion pursuant to 28 U.S.C. 2255, dated October 31, 1973). This interview, conducted on August 10, 1973 and characterized by appellant as a recantation, is set forth in full in the government's supplemental appendix (S.A. 1-52). It demonstrates that Mr. Cancelli had been approached prior to that time at least once by these investigators and at least once by appellant's cousin Sal Persico (S. A.2, 4,7-8). It establishes as well that Mr. Cancelli was contacted twice by the FBI during this period and once denied having been approached by anyone (S.A. 2-3, 8-10).

In pertinent part, the interview begins in this way:

Q: Joe, we're going to record this conversation that we're going to have with you.

CANCELLI: All right.

Q: In other words, we're putting it on tape, right? You understand that. . . . (S.A. 2)

* * * * *

Q: . . . We've been here before and we've spoken to you and you told us a story before. Right? Since that time we understand that a Sal Persico, a cousin of Junior Persico [appellant], was down to see you. Sal Persico told us to go to Baltimore and we beg you to be truthful. He begged you to be truthful and we're asking you to be truthful. (S.A. 4)

* * * * *

Let me explain something to you, for the reason of this meeting. Well, let me finish what Halper (phon.) started. He was down to see you, right? And Sal Persico told us that you're now prepared to tell us the story, the truth. What we want from you is the truth. Have any threats been made to you?

CANCELLI: Not now, no.

Q: No threats were made to you now? Any promises made to you? [S.A. 5, emphasis supplied]

CANCELLI: No.

Q: Was any offer of money given to you?

CANCELLI: No.

Q: Was any offer of money given to you?

CANCELLI: No.

Q: No offer of money was given to you?

CANCELLI: No.

Q: Your answer is no.

CANCELLI: (no response)

Q: And nobody from the Persico family threatened you?

CANCELLI: No. If we're putting this thing on tape let's get something straightened out--[interrupted by questioner] [S.A. 5, emphasis supplied]

* * * * *

Q: . . . The story you told us the first time--right?--I don't know if that was the truth or not. We were told to come back here to speak to you.

This is what we're looking for is only the truth.

CANCELLI: One thing, you came here, you came here with my uncle. You went upstate to see my uncle.

Q: We didn't.

CANCELLI: You didn't go upstate to see my uncle?

Q: No, we did not.

CANCELLI: See, I'm in the middle of this goddamn shit. You understand me, too. This is a helluva crazy predicament. . . . [S. A. 7]

* * * * *

CANCELLI: But they got me crazy. They was here two days ago.

Q: Who, the F.B.I.?

CANCELLI: The F.B.I. was here.

Q: What did they say to you and what did you say to them?

CANCELLI: They asked me if anybody was down here. I told them, no, nobody was here. [S.A. 9-10; emphasis supplied]

* * * * *

Q: Now suppose you tell us what the real story is, the truthful story? Regarding this case.

CANCELLI: Oh, boy. This is one big fucking headache to me. For years.

What was the real story with these license plates that I got involved with.

Q: You tell us.

CANCELLI: You tell me, because I really don't know what the fucking story is.

Q: I don't know what the story is.

Q: How would we know? We weren't present. . . . [S.A. 10; emphasis supplied].

The interview thereafter proceeded to somewhat more substantive matters.

The substance of the Cancelli statement can be gleaned only from a reading of the transcript because the statements therein are continually confusing and conflicting [Judge Dooling not only examined the transcript but listened to the tape recording of the interview as well (S.A. 82)]. The precise basis for the allegation of recantation is Mr. Cancelli's statement that, contrary to his trial testimony, appellant had said nothing during the course of the conversation with Spero at the Chateau Russo in December 1959

(S.A. 23-24). In the same interview, Mr. Cancelli had earlier protested that he "really [didn't] know what the [obscenity] story [was]" (S.A. 10) and, with specific reference to the conversation with Spero at the Chateau Russo, that it was "so long ago" that he "really [didn't] remember, to tell the truth, if he [appellant] said anything or not" (S.A. 18). With respect to the allegedly improper pressure applied by government officials to produce this allegedly false trial testimony, the interview is even less precise. Following the discovery that the Spero automobile driven by Cancelli in November 1959 bore stolen license plates, he was of course arrested. At the time, there was a letter in the automobile identifying co-defendant Spero as the sender (S.A. 57, 65). Thereafter, he was interviewed by a Detective Bartels. Mr. Cancelli is quoted as informing the interrogators that Detective Bartels told him how to testify at trial--according to appellant, falsely (S.A. 23). The pressure exerted against Cancelli is identified as a threat that if he did not cooperate with the authorities, he would be implicated in the hijackings (S.A. 13-16, 21-22). There is also an intimation--proferred by the interrogators and rejected by Cancelli--that Bartels in some manner threatened him by stating that the stolen license plates were involved in a murder case (S.A. 14-15, 20-21). Some time after his arrest, Cancelli was interviewed by an Assistant United States Attorney. When asked whether the prosecutor threatened him in any way, the following exchange occurred:

> CANCELLI: Well, they told me if I didn't go along with them, for Christ's sake, I was going to get roped in.
>
> Q: By "roped in" you mean being framed or getting involved in another crime that you actually weren't involved in?
>
> CANCELLI: All they told me, they said they thought I was involved with this gang up in New York. And I tried to prove to them. I said, I tell you what, let me call this guy's brother out. This Ralph Spiro's (sic) brother up. And he's the one that gave me this goddamn car. And they wouldn't let me call him up.

Q: Now, how did the Federal prosecutor threaten you?

CANCELLI: The Federal prosecutor, they got a subpoena. They subpoenaed me to go to New York.

Q: No, you said the Federal prosecutor tried to rope you in. I don't understand what you mean by that.

CANCELLI: The federal prosecutor told me I have to go up there as a witness. (S.A. 26-27).

Judge Dooling, in his Memorandum Order and Opinion, concluded that Cancelli's remarks, prompted by the incessant and suggestive questioning of the interviewers, (1) were of dubious credibility, (2) could not be characterized as a recantation, and (3) even if viewed as a recantation, would not have affected the result in the case. Judge Dooling also concluded that the allegations of prosecutorial misconduct set forth in appellant's motion were wholly unfounded. (S.A. 53-88).

B. <u>The Affidavit Of John Curatella, A Government Witness At Trial.</u>

Vaccaro testified at trial that during the planning stage of the hijacking, appellant asked co-defendant McIntosh whether he still had a license with him with which to hire a legitimate truck and McIntosh responded that he had the Peter Butiglire license with him. Appellant instructed McIntosh to hire a truck with the license (Tr. 1096-1105).

On August 13, 1959, co-defendant McIntosh, in the company of appellant, was stopped outside the Chateau Russo Bar by police officers O'Brien and Bartels. Officer O'Brien asked co-defendant McIntosh (whom he knew to be "Hugh McIntosh) to identify himself. McIntosh responded that he was "Peter Butiglire" and when asked for identification produced the Butiglire auto registration (S.A. 71-72).

At trial, John Curatella, a part-time employee of Leonard Truck Rental (located in the vicinity of the Akers Terminal and the Chateau Russo Bar),

testified that on July 28, 1959[the date of the hijacking], Leonard leased a truck to a Peter Butiglire, 237-A Wyckoff St., Brooklyn, N. Y., driver's license No. 6554221. The transaction was reflected in Leonard records concerning which Mr. Curatello, who had recorded the entry, testified. [237-A Wycoff Street was the address of an apartment leased in the name of a Peter Butiglire. According to Vaccaro's testimony, he and co-defendant Spero, who was carrying samples of the materials obtained in the hijacking, met there after the hijacking where they were joined later by appellant and another man.] (S.A. 71-74).

At trial Mr. Curatella identified the "Butiglire" license. He also identified co-defendant McIntosh's 1960 arrest photograph as the man to whom he had leased the truck. However, in accordance with the trial court's ruling on authority Simmons v. United States, 390 U.S. 377 and Stovall v. Denno, 388 U.S. 293, the photograph of McIntosh was not received in evidence. The jury was never informed that it was a photograph of co-defendant McIntosh and were instructed not to speculate concerning the identity of the person whose picture Mr. Curatella had identified as lessee of the truck (S.A. 73-74, 85-87).

In the affidavit submitted with appellant's motion, Curatella averred that he was asked on two occasions, by FBI agents and an assistant United States Attorney, whether a "Peter Butt" had rented a truck from Leonard Trucking and whether he could identify the person. He indicated that he probable could. According to Curatella, when he was first shown the photograph (presumably the 1960 FBI photograph of co-defendant McIntosh), he responded that he did not recognize the man. Thereafter, according to the affidavit, "the agents then told [him] to stop bullshitting them and that they knew [he] didn't want to get [himself] in trouble in connection with this hijacking [he] better tell them the truth as they believed it to be, that the picture [he] was shown was a person [he] knew as Mr. Peter Butt who had rented the truck in question" (S.A. 50).

Curatella went on to aver that after "continuous questioning and suggestions" in this manner, he did identify the picture as a person he knew at "Peter Butt" (S.A. 50). He further states in the affidavit that he eventually "put aside [his] fears and followed [his] conscience" and "testified truthfully at trial . . . that none of the defendants . . . rented a truck from [his] firm to [him] as Peter Butt" (S.A. 51).

For reasons set forth in the district court's opinion and discussed infra, Judge Dooling concluded that "[t]he Curatella affidavit is on its face, and when read against the record, valueless" (S.A. 85-87).

C. The Affidavit Of Arthur L. Mass.

In this motion, appellant also submitted the affidavit of attorney Arthur L. Mass. Mr. Mass alleges therein that on June 26, 1973, he visited the federal prison in Marion, Illinois and spoke with a prisoner, one Alphonse Castaldi. According to Mr. Mass, Mr. Castaldi told him that during December 1964 he was confined at the "Texicana" prison with Gaspar Vaccaro and that he and Vaccaro had several discussions concerning the testimony Vaccaro had given against appellant. According to Mr. Mass, Castaldi stated that Vaccaro had advised him that he had been mistaken in his trial testimony but had not corrected it because after having reported this mistake to the prosecutor, he was warned that any change of testimony would jeopardize his position. At the time, according to Mr. Mass' recollection of the information provided by Castaldi, Vaccaro was awaiting release on parole and Vaccaro told Castaldi that he planned to correct his mistaken testimony (S.A. 52).

Judge Dooling concluded that "[t]he Mass affidavit, too, is without any value, apart from its complete testimonial incompetency" and that the credibility of Vaccaro's recantation had, in any event, already been fully litigated (S.A. 87).

ARGUMENT

JUDGE DOOLING DID NOT ERR IN DENYING APPELLANT'S MOTION WITHOUT AN EVIDENTIARY HEARING

Following an exhaustive consideration of the points raised in appellant's motion, it was Judge Dooling's considered opinion that an evidentiary hearing was not required because the material before him conclusively demonstrated that appellant was entitled to no relief. Given the circumstances presented by the motion, taken together with the prior record in this case, this conclusion is not merely sound but, in our view, inescapable.

A. The Alleged Recantation Of Trial Testimony By Joseph Cancelli.

1. The Alleged Recantation is not Credible.

First it must be noted that Judge Dooling rejected the notion that Cancelli's deposition could be characterized as a recantation (S.A. 79). In any event, portions of the deposition--where Cancelli, quite equivocally, and after repeated prodding states that at the time he approached Spero after the hijacking at the Chateau Russo to complain about the automobile bearing stolen plates, appellant Persico made no comment to Spero during the course of this conversation (S.A. 23-24)--are purported to constitute a recantation. Of course, at trial Cancelli testified that appellant Persico stated to Spero: "You were stupid in giving him that car with the license plates" (App. 21; Tr. 3214). Thus, appellant contends, Cancelli retracted allegedly significant testimony implicating him and corroborating Vaccaro. Again, we note initially that Judge Dooling did not regard that testimony, allegedly retracted, as significant with respect to appellant (S.A. 70-71, 81, 84).

In our view, this alleged recantation of trial testimony can only be appreciated by examining in full Mr. Cancelli's August 10, 1973 statement (S.A. 1-48). This is so because it is difficult, if not impossible, to point out precisely what Mr. Cancelli says therein, so confusing and conflicting

are his remarks in response to questioning Judge Dooling generously described as "ardent, persistent and confusing" (S.A. 69).

As Judge Dooling observed--and portions of the outset of the interview designated supra at pp. 12-14, amply demonstrate:

> The interview discloses that Mr. Cancelli did not at first deliver to his interrogators even the dubities that he ultimately yielded. Something else was said first and other interventions than those of the interrogators apparently occurred. Apparently, meanwhile, and from some source, the Government learned of an approach to Mr. Cancelli, made an inquiry of him, and received a denial of any approach (cf. 425 F. 2d at 1383). 14/ It is difficult to suppress the will toward drawing an inference of ugliness from this sequence of events; [S.A. 83-84; footnote supplied].

Judge Dooling fully examined appellant's claim on the merits, concluding (1) that the statement viewed in toto did not really constitute a recantation and (2) that even if the statement were true, the allegedly false trial testimony would not have affected the outcome of the case with respect to appellant. Judge Dooling further concluded that evidence of improper governmental pressures upon Mr. Cancelli was utterly lacking (S.A. 78). With these bases, discussed infra, providing ample justification for the rejection of appellant's claim without an evidentiary hearing, Judge Dooling may have been reluctant to state unequivocally that the alleged recantation was without question not credible. This reluctance may have stemmed either from the implications which necessarily inhere in such a finding or from the fact that the statement could not really be viewed as a recantation.

14/ This is a reference to this Court's opinion affirming the convictions following the fifth trial. On the cited page (p. 1383) this Court began its discussion on the propriety of Judge Dooling's ruling at trial that the witnesses Vaccaro and Cancelli need not, on cross-examination, disclose their addresses or places of employment. This Court upheld that ruling, noting: "It was primarily out of fear for the witnesses' personal safety that Judge Dooling limited cross-examination. We think that his determination was correct." [425 F. 2d at 1384].

It is, however, fair to conclude from Judge Dooling's above-cited comment and others that Judge Dooling did not regard Cancilli's "recantation", if such it be, as credible. At one point in fact the Court below did observe that "[a] high degree of intrinsic improbability attends the assertion, if Mr. Cancelli is really saying that much, that Detective Bartels was the author of his testimony about Mr. Persico's remark" (S.A. 81).

Assuming, arguendo, that Cancelli, in his August 10, 1973 statement, retracts that portion of his trial testimony wherein he stated that appellant remarked to Spero that "You were stupid in giving him that car with the license plates" (App. 21; Tr. 3214), that recantation is simply not credible. As this Court has observed, a witness' recantation should be looked upon with utmost suspicion or skepticism. United States v. Troche, 213 F. 2d 401, 403 (1954). This proposition, a reflection of judicial experience, derives from the recognition that once a conviction is obtained, the temptation to employ nefarious methods to avoid the enforcement of just sentences is greatest. United States v. Johnson, 327 U.S. 106, 112-113 (1946); United States v. Lombardozzi, 343 F. 2d 127, 128 (2nd Cir., 1965), certiorari denied, 381 U.S. 938; United States v. Costello, 255 F. 2d 876, 879 (2nd Cir., 1958), certiorari denied, 357 U.S. 937. Thus, an unfavorable presumption ordinarily attaches to a witness' recantation. We submit that in the exceptional circumstances of this case that presumption has become very nearly irrebutable.

This is appellant's third attempt to upset his conviction on the basis, in large part, of allegations that government witnesses perjured themselves at trial. The circumstances of the two prior motions are set forth in the government briefs on appeal in those cases (Nos. 71-1648 and 72-1472) and, in part, herein. In the first, predicated upon the allegedly "new" testimony of Harold O'Shea and Vaccaro's partial corroboration of that

testimony, characterized as a recantation, Judge Dooling concluded that the testimony of O'Shea and Vaccaro's adoption of that testimony were not credible (A. 22-23). Stated more candidly, this amounts to a finding that the O'Shea testimony was fabricated. This conclusion was amply supported by the record (see gov't. br. on appeal at pp. 16-17, No. 71-1648). In the second motion, appellant relied upon a more extensive recantation of Vaccaro's trial testimony, specifically, that implicating appellant. Judge Travia considered the motion on the basis of affidavits and other materials, concluding that an evidentiary hearing was not required. He further concluded that Vaccaro's recantation was utterly lacking in credibility (e.g., A. 823, 831) and at one point even pointed squarely to the "likelihood that [Vaccaro's recantation] [was] of dubious origin" (A. 817). Again, this conclusion was amply supported by the record (see gov't br. on appeal at pp. 14-19, No. 72-1472). Given these prior findings and the implications of those findings, it is fair and manifestly reasonable to approach this third alleged recantation-not only with the skepticism dictated by the case law, but with a strong presumption that it is not credible. Viewing the Cancelli statement in isolation, the circumstances indicate that such a presumption is warranted.

At the outset of the interview Cancelli is asked whether he has been threatened in any way. He responds, "Not now, no" (S.A. 5). When the question is subsequently reiterated, Cancelli responds, "No. If we're putting this thing on tape let's get something straightened out . . ." (S.A. 6). He was immediately interrupted. Then Cancelli observes that the interviewers "went upstate to see [his] uncle"; they deny as much (S.A. 7). Subsequently, he tells them that he has been visited by the F.B.I. and was asked whether "anybody was down here." Even though Cancelli had been approached by both the interviewers and Sal Persico, he informed the interviewers that he denied to

the F.B.I. that he had been approached (S.A. 9-10). When asked what the "real story" was, Cancelli responded, "You tell me, because I really don't know what the [obscenity] story is" (S.A. 10). Subsequently, when asked whether appellant made any comments when Cancelli went to see Spero at the Chateau Russo Bar, Cancelli responded: "Oh, Christ, it's so [obscenity] long ago. I really don't remember, to tell the truth, if he said anything or not (S.A. 18, 64). Thereafter, and following persistent and highly suggestive questioning, Cancelli finally states that his trial testimony, to the extent that it referred to a statement made by appellant at the Chateau Russo, was not true (S.A. 23-24). He finally indicates as well, though the statement is conflicting and utterly equivocal on this point, that this "false" trial testimony was the product of pressure applied by a Detective Bartels and a federal prosecutor (S.A. 20-37). As Judge Dooling aptly observed, "the specific pressure exerted kept vanishing under the effort to examine it" (S.A. 69).

The court below also notes that "[t]here was not any genuine correspondence between what he [Cancelli] did testify to and what he says was demanded of him by Detective Bartels" (S.A. 70). Moreover, as Judge Dooling noted, Cancelli expressly denied at trial that any threats were made to him by government representatives (S.A. 61).

Finally, it is important to note that at trial Cancelli refused to disclose his address and place of employment. This refusal was countenanced by the trial court's ruling, which was predicated upon a "fear for the witnesses' personal safety" which this Court concluded was justified, United States v. Persico, supra, 425 F. 2d at 1384. In his opinion, Judge Dooling alludes to, but does not elaborate upon, this factor, supra, note 14.

If in this statement Mr. Cancelli has in fact retracted a portion of his trial testimony--a conclusion rejected by Judge Dooling-the aforementioned circumstances persuasively show that the retraction of testimony is unworthy of belief.

2. Judge Dooling properly concluded that the Cancelli statement could not be characterized as a recantation.

The Cancelli statement, viewed in its entirety and including the inconsistencies as well as the prodding and suggestive tenor of the interview previously noted, presents ample basis for Judge Dooling's characterization of the statement as "palliative testimony dubiously proferred" (S.A. 84) and his finding that the statement "can not be called recantation" (S.A. 79). Judge Dooling's observations in this respect, some of which are cited below, follow from a close and careful scrutiny of the record and are clearly reasonable:

> [Cancelli's] denial of his earlier testimony is limited to an attenuated and defensive denial that he overheard any remarks that Mr. Persico made and that he, personally, had any relevant conversation with Mr. Persico. His trial testimony was not that he ever spoke directly to Mr. Persico but that he did hear Mr. Persico characterize Spero's action in giving Cancelli a car with 'them stolen license plates' on it as stupid. [S.A. 70]

* * * * *

> The closest scrutiny of Mr. Cancelli's statement leaves it quite uncertain how much of his testimony he wished cautiously to withdraw. It is not altogether plain that he is doing anything except colorably withdrawing, or blurring in diluted present recollection, his simple 1964 and 1968 testimony that Mr. Persico did make the remark to defendant Spero. The line Mr. Cancelli took on August 10, 1973, can not be called recantation. [S.A. 79]

* * * * *

> The more real question is, how far does Mr. Cancelli go toward retracting his testimony? The conclusion from reading the whole of the testimony of the interrogation and listening to it played from the tape ... is that Mr. Cancelli was not genuinely confessing or asseverating that his words about Mr. Persico's statement were false and that Mr. Bartels had furnished the lie to him but, rather, that he was being a "nice guy" to interrogators who were transmitting to him insistent and persistent pressure built up by Sal Persico's visit, their own earlier visit, and their success in persuading Mr. Cancelli that he was responsible for the imposition on Carmine Persico, presented to Mr. Cancelli as an innocent man, of a 14-year prison sentence. A niggard in his in-Court testimony, Mr. Cancelli is a niggard in his supposed withdrawal of part of it. The overall impression

> of the transcript and of the tape recording is that Mr. Cancelli was trying still to secure every door against any attack on him while readying every door of escape for himself. Rejecting any intimation that he had perjured himself at either trial, Mr. Cancelli in essence testified that he did not really have a genuine recollection in 1974 of what may or may not have been said in his presence in the Club in 1959 (August 10, 1973 transcript pp. 18, 30, 34, 35-36, 47). [S.A. 82-83]

The Court's conclusion that the Cancelli statement is not a recantation is sound. The scope of review by an appellate court in reviewing a ruling on a motion for a new trial based on newly discovered evidence, and a fortiori here, is set forth in United States v. Johnson, 327 U.S. 106, 111-112 (1946), which also involved an attempt to show that a government witness had given false testimony at trial. The Court said that findings of fact of the trial court should not be set aside unless it "clearly appear[s]" that those findings are "not supported by any evidence." See also, United States v. Silverman, 430 F. 2d 106, 119-120 (2nd Cir., 1970, certiorari denied, 402 U.S. 953; United States v. Curry, 358 F. 2d 904, 918-919, (2nd Cir., 1965); United States v. Costello, 255 F. 2d 876 (2nd Cir., 1958), certiorari denied, 357 U.S. 937. Here, as in Johnson, "the trial judge's [conclusion is] supported by evidence." See also, United States v. Curry, supra, 358 F. 2d at 918, where this Court noted that a judge who presided at trial, as did Judge Dooling, is in a better position to evaluate an alleged recantation, stating: "[w]hen, as here, the district judge resolves all doubt against the defendant and determines that the trial testimony is not impeached by the recantation, there is no need to try the case anew before a jury."

3. Judge Dooling properly concluded that even if the Cancelli statement were viewed as a credible recantation, the allegedly false trial testimony was insignificant with respect to appellant and would not have affected the result.

It is appellant's theory that Cancelli's allegedly false trial testimony was significant because it corroborated the trial testimony of the government's chief witness Gaspar Vaccaro. However, as Judge Dooling observed, the critical relevancy of Mr. Cancelli's trial testimony was that it corroborated Vaccaro's testimony implicating co-defendant Spero and connecting the stolen automobile to the hijacking (S.A. 81). The importance of the testimony therefore was not so much that it verified Vaccaro's testimony about the stolen car but, rather, that a portion of Vaccaro's testimony was thereby corroborated -- thus, furnishing a basis for crediting Vaccaro's testimony in its entirety. Of course, appellant does not contend that the substance of Mr. Cancelli's trial testimony was false. Unlike the central thrust of Cancelli's testimony, his testimony with respect to the remark made by appellant was, as Judge Dooling observed, "at best, in the form given, a small tile in a large mosaic, the absence of which would scarcely be missed" (S.A. 81). Judge Dooling thus concluded:

> The palliative testimony dubiously proferred is not sufficient in content, in light of the other evidence at trial, including that of the witness Valachi, to found an argument that either the absence of the testimony attacked, or the addition of testimony along the lines of the interview, could have affected the result of the case as against Mr. Persico. [S.A. 84]

Clearly, no one is in a better position to assess the likely import of this testimony than Judge Dooling, who presided at trial. The assessment is a sound one and the Court's finding in this regard should not be disturbed. United States v. Johnson, supra, 327 U.S. at 111-112;

United States v. Silverman, supra, 430 F.2d at 119-120; United States v. Curry, supra, 358 F.2d at 918-919; United States v. Costello, supra, 255 F.2d 876.

Where a new trial is sought on the grounds of recantation of material trial testimony, the motion will be granted where (1) the court is reasonably well satisfied that the trial testimony given by the material witness is false; (2) without the false testimony the jury might have reached a different conclusion; and (3) the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after trial, Larrison v. United States, 24 F.2d 82, 87 (7th Cir., 1928). See, United States v. Silverman, 430 F.2d 106, 119 (2nd Cir., 1970); United States v. Miller, 411 F.2d 825, 830 (2nd Cir., 1969); United States v. Costello, 255 F.2d 876, 879 (2nd Cir., 1958), certiorari denied, 357 U.S. 937; United States v. Troche, supra; United States v. Aviles, 197 F. Supp. 536, 539 (S.D. N.Y., 1961), affirmed, 315 F.2d 186 (1963). Given these standards and the findings of the district court, which are amply supported by the record, it is clear that appellant's motion was properly denied.

4. Appellant's claim of prosecutorial misconduct is, as Judge Dooling concluded, utterly without merit.

Appellant's renewed attempt 15/ to raise the spectre of prosecutorial misconduct was unsuccessful in the court below, which observed that "[w]hile the present motion is framed under § 2255 and fashioned as a

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15/ In the motion for a new trial before Judge Travia, prosecutorial misconduct -- the knowing use of Vaccaro's false testimony -- was raised and, of course, rejected.

claim of prosecutorial misconduct, that aspect of the application evaporates upon mere inspection" (S.A. 77). With respect to this claim, we rely upon Judge Dooling's observations and analysis: 16/

> While Cancelli's Baltimore statement of August 10, 1973 under questioning that can only be characterized as ardent, persistent and confusing is replete with assertions of coercion exerted upon him by Detective Bartels and the Federal Prosecutor, the specific pressure exerted kept vanishing under the effort to examine it. He rejected the idea that he was threatened with a murder prosecution because the 1953 Nash [Spero's automobile] was somehow connected with a murder, but he was rather clearer in indicating that Detective Bartels kept insisting that unless he testified as the Detective wanted him to he would be implicated in the hijacking. There is not any genuine correspondence between what he did testify to and what he says was demanded of him by Detective Bartels. 17/ [S.A. 69-70; footnote supplied]
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> * * * * *
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> [T]he pressures exerted upon [Cancelli] were nil. He was indeed and very properly arrested on November 23, 1959. Driving a car that had one part of its proper registration in it, but which was carrying not its own license tags but those, it was soon clear, of a stolen car, Mr. Cancelli also had in his possession a letter written by Ralph Spero which he was supposed to mail. A necessary inference from Detective Bartel's prompt interview of Mr. Cancelli while the latter was still at the Newburgh jail is that the highway incident was immediately connected

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16/ Of course, the claim of prosecutorial misconduct does not survive at all if the alleged recantation is not credible, as we have maintained.

17/ For example, Cancelli's trial testimony did not, as Judge Dooling noted, indicate that Detective Bartels was present at the Chateau Russo when Cancelli went there to speak to Spero nor did it indicate that Cancelli, personally, conversed with appellant Persico while there (S.A. 78-79). In his statement, however, Cancelli says that Bartels told him to testify at trial that Bartels was at the Chateau Russo at the time and that he, Cancelli, was "talking to Junior [appellant]" (S.A. 23).

with the Akers or some other hijacking which Detective Bartels was investigating. * * * Mr. Cancelli was certainly questioned, and he should have been, and apparently he was, warned that inadequate explanations would lead the police to infer that he was connected with the Akers hijacking or other hijackings under investigation, and with the theft of the Rossi Buick. 18/ Mr. Cancelli's statements do not remotely suggest that improper pressures were brought to bear upon him by Detective Bartels in 1959 or by the Prosecuting Attorney and Detective Bartels in 1964. The only pressure clearly referred to was that exerted by the service upon him of a subpoena requiring his attendance at the trial. Mr. Cancelli's testimony does not suggest the existence of any pressure when he testified at the fifth trial. He swore that no threat was made against him when he was interviewed before trial, and that nobody had spoken to him in the period between September of 1967 and April of 1968 when he testified at the fifth trial. Pressure could hardly appear from the gap of over four years between his 1959 and his 1964 interviews with Detective Bartels and the Assistant United States Attorney. [S.A. 77-78; footnote supplied]

* * * * *

There is no intimation that the Assistant United States Attorney knew of any pressure from or instructions from Detective Bartels exerted on Mr. Cancelli to get him twice to testify as he had testified. The question comes down to Mr. Bartel's role. But Mr. Bartels was examined out of the jury's presence, although under oath, at the fourth trial (Tr. 7264-7275) about his 1959 and 1964 interviews with Mr. Cancelli; and about the statement given by Mr. Cancelli in 1964 during the interview in which the Assistant United States Attorney participated. Mr. Cancelli, too, was examined at the 1964 trial out of the jury's hearing (Tr. 7232-7262) about his 1964 interviews with John Hopkins, and then with Detective Bartels and the Assistant United States Attorney, as well as about his 1959 interview in the Newburgh jail with Detective Bartels. Mr. Cancelli estimated the length of the 1959 interview at half an

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18/ The Rossi Buick was the stolen car used in the hijacking. The plates on the Spero car in which Cancelli was arrested were taken from the Rossi Buick.

hour (Tr. 7239), Mr. Bartels estimated it at fifteen minutes (Tr. 7275). * * * There was, therefore, knowledge nine years ago about Mr. Cancelli's interviews. [S.A. 79-81]

* * * * *

As the transcripts of the fourth and fifth trials make clear, Mr. Persico and his counsel had ample opportunity, and took full advantage of it, to explore the issue of the background of Mr. Cancelli's testimony in 1964, and in 1968 cut off inquiry when defendant Spero's counsel sought to reopen the issue in 1968. The issue is exhausted. See United States v. Persico, supra, 454 F.2d at 722. [S.A. 84-85]

The niggard testimony twice given by Mr. Cancelli does not suggest implanted police invention. Implanted police invention can never have been less damning or more vulnerable to the attack of irrelevancy and remoteness than defense counsel addressed to it. [S.A. 81]

5. Judge Dooling properly ruled that an evidentiary hearing was not required.

Appellant's unsuccessful applications for post-conviction relief have already consumed an inordinate amount of judicial and other resources. See Schneckloth v. Bustamonte, 412 U.S. 218, 260-261 (concurring op. of Mr. Justice Powell). In this case, there was a hearing, though not an evidentiary one. Judge Dooling gave close and careful attention to appellant's claims, all of which are considered in his exhaustive opinion. To have granted an evidentiary hearing would, in our view, have constituted a wholly unwarranted expenditure of judicial and prosecutorial resources. Of course, if this Court accepts Judge Dooling's finding that either the absence of the allegedly false trial testimony or the presence of testimony along the lines of Cancelli's 1973 statement would not have affected the outcome of the case with respect to appellant, then clearly no evidentiary hearing was required. However, we also believe that, given "the feebleness of the interview"

(S.A. 84), an evidentiary hearing was not warranted. Thus, we think the soundness of Judge Dooling's conclusion -- that an evidentiary hearing was not required because the materials before him conclusively demonstrated that appellant was entitled to no relief -- manifest.

B. **The Additional Matters Presented** In Support Of Appellant's Motion.

1. Judge Dooling properly concluded that the affidavit of government trial witness John Curatella was, "on its face, and when read against the record, valueless". [S.A. 85]

Appellant attempts to bolster his claim of prosecutional misconduct with an affidavit from government trial witness John Curatella. For compelling reasons which fully appear in the opinion of the district court, upon which we rely, the claim was properly rejected. After noting in detail the substance of Curatella's trial testimony (set forth supra at p16-18), Judge Dooling proferred the following observations in rejecting appellant's claim:

> Mr. Curatella did not identify the defendant McIntosh as the Peter Butiglire who had rented the truck. [S.A. 73]
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> * * * * * *
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> He was not asked to nor did he make a courtroom identification of defendant McIntosh, nor was the jury told whose picture he had identified. [S.A. 74]
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> * * * * * *
>
> If any impression emanates from the Curatella testimony it is that fear of or sympathy with or complicity with the defendants or some of them induced him to dilute his testimony as much as he could manage (see Tr. 3684). In view of the cross-examination, the witness's implied (in 1968) and presently asserted inability to have made a courtroom identification does not suggest candor or forthcomingness on either occasion.
>
> The Curatella affidavit is a protest that his failure to identify Mr. McIntosh as the police urged him to--on excellent grounds--was due to conscience. It is the affidavit that discloses, however, that he gave minimal

testimony out of choice in circumstances in which his failure to identify Mr. McIntosh directly and straightforwardly is all but impossible to explain on grounds of truth telling. [S.A. 74-75]

* * * * * *

The Curatella affidavit is on its face, and when read against the record, valueless. Burns v. United States, 321 F.2d 893, 896-897 (C.A. 8, 1963). Even if it were true that Mr. Curatella genuinely could not identify Mr. McIntosh as the Peter Butiglire who had leased trucks from Leonard (and he was not asked to do so at trial) or to identify the 1960 photograph of Mr. McIntosh as that of Butiglire, the Leonard truck lessee, as he now says he did only under prosecution urging, his failure of identification is among the suspicious trivia of the case. The critical evidence was the Leonard Rental book, the Butiglire registration and operator's license with the Wyckoff Street address on each, the incontrovertible testimony of Detective Hugh O'Brien to finding the Peter Buriglire registration on defendant McIntosh's person and to his hearing Mr. McIntosh identify himself as Peter Butiglire when Mr. McIntosh was accosted outside the Chateau Russo, sixteen days after the hijacking, and Detective O'Brien's testimony of the difference in Mr. McIntosh's appearance in 1959 and 1968. The fact was that defendant McIntosh was then in the company of Mr. Persico and Joseph Magnasco (Tr. 3650), originally a defendant in the present case; the case against him abated when he died by violence before the fourth trial. [S.A. 85-86; emphasis supplied]

* * * * * *

All that was before the jury was that Mr. Curatella had identified 'a' picture as that of Peter Butiglire; the Court and counsel knew that it was a picture of Mr. McIntosh, but the jury was not so informed; the jury was instructed (at defendant's request) not to speculate about the identification of the person whose picture Mr. Curatella had identified as a picture of the lessee of the truck (Tr. 3684-3690).

> Mr. Curatella's affidavit is wrong in its assertion that conscience and consultation resulted in Mr. Curatella's declining to identify the picture that was shown to him. It can only be said that Mr. Curatella's affidavit recreates the atmosphere of untrustworthiness that in the courtroom emanated from his testimony. [S.A. 86-87; emphasis supplied]

2. The Mass Affidavit.

With respect to the Mass affidavit, Judge Dooling properly rejected this renewed attempt to credit Gaspar Vaccaro's prior recontation, observing:

> The inevitable and inevitably renewed attack on the testimony of Gaspar Vaccaro on this occasion takes the form of an affidavit of counsel that one Alphonse Castaldi, who was allegedly in prison with Gaspar Vaccaro in Texicana in December 1964, told the attorney that Gaspar Vaccaro had then said to Castaldi that he had been mistaken in his testimony but did not correct it because, after reporting the error to the Prosecutor, the Prosecutor warned him that Vaccaro's own position would be jeopardized if he changed his testimony. * * * In light of the two earlier motions based on attacks on the Vaccaro testimony and their disposition, the present relation of the supposed Castaldi assertions is nugatory. [S.A. 75-76]
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> * * * * * * *
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> The Mass affidavit, too, is without any value, apart from its complete testimonial incompetency. It relates to an assertion that Vaccaro made statements in December 1964 about mistakes in his testimony in the Akers hijacking case. The alleged Vaccaro assertion is recognizably that advanced with elaboration in 1972 and fully passed upon at the time by Judge Travia. United States v. Persico, 339 F. Supp. at 1080-1081, affirmed on opinion below, 467 F.2d 485. See Laughlin v. United States, 474 F.2d 444 (C.A. D.C., 1972). [S.A. 87]

CONCLUSION

For the reasons stated, and those set forth in the opinion of the district court, it is respectfully submitted that the order of the district court should be affirmed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Brief for Appellee have been mailed to Gino E. Gallina, Esquire, LENEFSKY, GALLINA, MASS & HOFFMAN, 30 Broad Street, New York, New York 10004, counsel for Appellant.

DATED: May 30, 1974

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